Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2015

JOHN H. THOMAS AND JON-T. FARMS, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, John H. Thomas and Jon-T. Farms, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming their convictions in the United States District Court for the Northern District of Texas for filing false statements with, and converting the property of, the Commodity Credit Corporation. Petitioner Thomas also seeks review of his one-count conviction for making a false statement on a federal income tax return.

OPINIONS BELOW

The first opinion of the court of appeals is reported at *United States* v. *Thomas,* 593 F.2d 615 (5th Cir. 1979) and attached as Appendix A. The opinion was modified on rehearing, 604 F.2d 450, attached as Appendix B.

The district court memorandum opinion on remand was largely excerpted in the court of appeals' opinion on appeal from the remand, not yet reported, which is attached as Appendix C.

JURISDICTION

The court of appeals retained jurisdiction of this case pending its resolution of that portion which had been remanded. The order on remand and final judgment of the court of appeals was entered on May 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Once a defendant has successfully moved to dismiss an indictment, may the government seek and obtain a new indictment, based on the same evidence presented to the first grand jury, which exposes the defendant to greater punishment than that to which he was exposed before the motion was filed? Does this not fail the "appearance of vindictiveness" test established in *Blackledge* v. *Perry,* 417 U.S. 21 (1974) and require dismissal of the enhanced charges?

2. When must the government be bound by the terms of a mutually agreed upon plea agreement when the plea itself has not yet been formally entered? Is it permissible for the government to negotiate a plea agreement, over a period of several months, without notice to the defendant that the grand jury investigation which has induced the negotiation process will result in indictments notwithstanding the plea agreement?

3. Whether a relatively technical departure from a complex and newly minted set of bureaucratic guidelines is a proper basis for criminal prosecution, given particularly an affirmative regulatory statement by the administering federal agency that only civil remedies were to be used. Specifically, was 7 C.F.R., Part 795, The Payment Limitation Regulations of the Upland Cotton Price Support Program, as it existed in 1971 through 1973, intended by Congress or the Secretary of Agriculture to be the basis for criminal liability under 15 U.S.C. § 714m(a) and § 714m(c)?

STATEMENT OF THE CASE

John Thomas (Thomas) was adjudged guilty of 91 counts of a 92-count indictment under 15 U.S.C. § 714m(a) (false statements) and 714m(c)[1] (conversion of Commodity Credit Corporation—CCC—property), and sentenced to concurrent terms of three years on each count. Jon-T. Farms, Inc. (Farms) was convicted on 90 counts of the same indictment. Fines against Thomas and Farms totalled $344,000.

Thomas was adjudged guilty of one count of a four-count indictment under 26 U.S.C. § 7206 and sentenced to three years, to be served concurrent to the above sentence, and a $5,000 fine.

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[1] The statutes provide, in relevant part:

§ 714m.

(a) Whoever makes any statement knowing it to be false, . . . for the purpose of influencing in any way the action of the Corporation, . . . shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both.

(c) Whoever shall willfully . . . convert to his own use or to that of another property owned or held by, . . . the Corporation, . . . shall, upon conviction thereof, if such property be of an amount or value in excess of $500, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both. . . .

These appeals were consolidated below and are submitted as one petition here.

John H. Thomas, like most farmers and businessmen involved in the production of agricultural commodities in West Texas, depended upon federal price support payments. The dispute which culminated in the indictments in this case concerns the administration and interpretation of the complex regulations governing the Upland Cotton Price Support Program.

In 1970, new regulations governing upland cotton, 35 Fed. Reg. 19339, codified to 7 C.F.R. Part 795 (1971), were issued. The amendments provided that no "person" could receive more than $55,000 in any crop year as a price support for upland cotton. 7 U.S.C. § 1307 (1971), P.L. 91-524, 88 Stat. 1358.

The Congress recognized that a $55,000 limitation would wreak havoc in the cotton industry unless some provision was made to limit its effect. In 7 U.S.C. § 1307(4), therefore, the Secretary of Agriculture was given authority to define "person." He did so, in a complex and confusing set of regulations which studiously and completely depart from the common sense definition of "person."[2]

The most generous regulation, however, was that relating

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[2] 7 C.F.R. § 795.3 (1971), 35 Fed. Reg. 19339, provided:

> Subject to the provisions of this part, the term "person" shall mean an individual, joint stock company, corporation, association, trust, estate, or other legal entity. In order to be considered a separate person for the purpose of the payment limitation, in addition to the other conditions of this part, the individual or other legal entity must
>
> (a) Have a separate and distinct interest in the land or the crop involved,
>
> (b) Exercise separate responsibility for such interest, and
>
> (c) Be responsible for the cost of farming related to such interest from a fund or account separate from that of any other individual or entity.

to partnerships and joint ventures, § 795.6, which expressly excluded such groups from the restrictions of § 795.3.[3]

Although CCC is a part of the federal bureaucracy, and though the price supports it administers are codified in Title 7, C.F.R., the decisions of basic importance to those involved in agricultural production are made at the county level by officials elected by farmers, the members of the County Agricultural Stabilization and Conservation Service Committee (ASCS). The Committee, aided by professionally trained staff, administers the various statutory and regulatory programs.

Thomas consulted with Executive Directors of ASCS in two counties who outlined the options and laid stress on a joint venture concept.

Thomas then consulted with an attorney who checked things out with ASCS and drafted two joint venture agreements.

Under the new regulations, Farms could not plant all its land to cotton and still participate fully in government price support programs. The corporation therefore leased most of its land to the joint ventures which farmed the leased land by using the services of a custom farmer.

The venturers' leased land was properly farmed, as verified by ASCS employees, and they received their price support payments. These payments were, under assignment

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[3] A partnership, joint venture, tenants-in-common, or joint tenants shall not be considered as a person but, *notwithstanding the provisions of § 795.3, each individual or other legal entity who shares in the proceeds derived from farming by such joint operation shall be considered a separate person* except as otherwise provided in this part and shall be listed as a producer for payment purposes on program documents. The payment shares listed on the program documents for each individual or other legal entity shall be the same as each individual or other legal entity who shares the proceeds derived from farming such joint operation. [Emphasis added].

forms furnished by the ASCS (ASCS Form 36) and in regular use for crop loans, sent to banks to pay off loans. The venturers had a loss initially, but wound up with a small eventual profit. These profits were accounted for to the venturers and to the Internal Revenue Service.

In participating in the price support program, two basic ASCS forms were filled out. The first, ASCS 516, is termed an Intention to Participate and Application for Payment. It is filled out to identify every person with an interest in the crop, as required by 7 C.F.R. § 795.6. Since the venturers had an interest in the crop, their names are on the form, and they, through their agent, signed it. This form is typically filed before the crop season begins.

Once the crop is in, a second form is filed which shows who is entitled to receive a payment if under the regulations any is due. This form, an ASCS 580 Certification, was also filled out and filed.

The government began investigating the ventures, contending that the joint venture agreements were shams rather than bona fide and substantive changes in petitioners' farming operations.

THE INDICTMENTS

The first indictment in this case charged seventy-one violations of § 714m(a) and one violation of § 714m(b) for alleged falsities contained in ASCS forms 36, 516 and 580. Thomas and Farms, asserting their constitutional and statutory rights to be notified of the offenses with which they were charged, moved to dismiss the indictment. *See Russell* v. *United States,* 369 U.S. 749 (1962). Based on the motion, the court dismissed sixty-nine of the counts and the remaining three counts were dismissed upon the government's request.

Thereafter, based on the same set of facts, Thomas and Farms were charged with forty-four violations of § 714m

(a), forty-eight violations of § 714m(c) (the conversion counts), and a four-count tax indictment. There was no notice whatsoever that, if Thomas prevailed on the motion to dismiss, the government would vindicate the loss by filing the additional charges.[4]

These increased charges were the subject of the court of appeals' remand order and are addressed in Point I of the Reasons for Granting the Writ, which integrates the factual background.

THE PLEA AGREEMENT

After dismissal of the first indictment, the petitioners and the government began to negotiate a plea agreement. Communication with the local United States Attorney's office broke down and petitioners' counsel met with Mark Richard, the Chief of the Fraud Section, Criminal Division, of the Department of Justice in Washington. Richard accepted a plea offer of four *nolo contendere* misdemeanor pleas for Thomas and one *nolo contendere* felony plea for Farms. Richard delegated the task of working out the details to an assistant. The agreement was formalized by letter from the local United States Attorney, Michael Carnes, to petitioners' counsel.

Throughout this process, an assistant United States Attorney had been presenting a tax case to the grand jury of which petitioners' counsel was totally unaware.

When Carnes informed petitioners' counsel that a tax indictment would be returned notwithstanding the plea agreement, petitioners' counsel considered the agreement breached. Under these circumstances, Thomas elected not to enter the pleas which had been agreed upon, but to permit himself to be indicted in both cases and move to dis-

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[4] Essentially, the government abandoned all but forty-four of its § 714m(a) charges, and got more than even by doubling up each of these forty-four with a § 714m(c) charge.

miss them while reaffirming his willingness to go through with the plea agreement which had been made.

An evidentiary hearing was held and the district court found that the plea agreement had not been finalized. The court of appeals affirmed. *See* Appendix A at 11a-13a.

REASONS FOR GRANTING THE WRIT

1. There Is A Direct Conflict Among The Circuit Courts Of Appeal As To The Standard Of Proof Required In The Case Of An Alleged Retaliatory Or Vindictive Prosecution.

As Justice Stewart emphasized in *Russell* v. *United States* 369 U.S. 749, 763-65 (1962), one of the most fundamental protections which guarantees an accused's fifth amendment right to due process and sixth amendment right to be informed of the nature of the accusations against him is the requirement that an indictment contain each of the essential elements of the offense charged. Federal Rule of Criminal Procedure 7(c) and Rule 12(b)(2) embody the statutory right and procedural vehicle which breath life into Justice Stewart's observations. Rule 7(c)(1) provides that "the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Rule 12(b)(2) provides that a motion to dismiss must be raised prior to trial if it is "based on defects in the indictment or information." Thus, Federal Rule of Criminal Procedure 7(c), the sixth amendment and the specific holding in *Russell* demand that the essential elements constituting the "false statement" must be alleged in charging a 714m(a) offense.

This court has recently reaffirmed the principle that in the context of regulatory schemes the government must allege each and every element of the offense. *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978).

The petitioners asserted these constitutional and statutory rights when the first indictment was returned, charging that all seventy-two counts failed to allege a literal

falsehood as is required by *Bronston* v. *United States,* 409 U.S. 352 (1973). The district court dismissed sixty-nine counts of the indictment based on this principle.

It is not contested here that but for the petitioners filing of the motion to dismiss the first indictment based on their constitutional and statutory rights the forty-eight conversion counts in the second indictment would not have been returned. It is also not seriously contested that but for the filing of the motion to dismiss, the government would not have gone back to a new grand jury and vigorously pursued each piece of paper which had been presented to the first grand jury in order to obtain the tax indictment.

In *North Carolina* v. *Pearce,* 395 U.S. 711 (1969) the Court held that the due process clause of the fourteenth amendment "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." The same principle was later applied to prohibit a prosecutor from reindicting a convicted misdemeanant on a felony charge after the defendant had invoked an appellate remedy, since the circumstances posed a "realistic likelihood of vindictiveness." *Blackledge* v. *Perry,* 417 U.S. 21, 27 (1974). Both *Blackledge* and *Pearce* make clear that the purpose of the doctrine of prosecutorial vindictiveness is to insulate the exercise of federal constitutional and statutory rights to assure all prospective defendants that there can and will be no chilling consequences from the successful assertion of the right.[5] The ninth circuit has followed these principles strictly in holding that it is "the appearance of vindictiveness, rather than vindictiveness in fact, which

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[5] *Bordenkircher* v. *Hayes,* 434 U.S. 357 (1978), is not to the contrary. This is not a situation where, as in *Hayes,* the prosecution fully disclosed during plea negotiations that additional charges would be filed if a plea agreement was not reached. Here, without notice, Thomas was penalized for exercising a constitutional and statutory right.

controls," *United States* v. *Groves*, 571 F.2d 450, 453 (9th Cir. 1978); *United States* v. *Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976); *see United States* v. *DeMarco*, 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977), as has the District of Columbia Circuit, *United States* v. *Jamison*, 505 F.2d 407 (D.C. Cir. 1974), and the first circuit, *Covett* v. *Butterworth*, 610 F.2d 1002 (1st Cir. 1979). The court of appeals for the District of Columbia has applied the same test, *Wynn* v. *United States*, 386 A.2d 695 (D.C. Ct.App. 1978). Each of these cases was decided without a finding as to the motives of the prosecutor. Under the appearance of vindictiveness test it is irrelevant.

The fifth circuit has adopted a conflicting approach, holding, in most cases, that the motives and state of mind of the prosecutor at the time of the filing of the increased charges are determinative. The court has, as in this case, remanded cases to afford the prosecutor the opportunity to prove that the filing of the increased charges was not motivated by "actual vindictiveness." *See, e.g.'s, Hardwick* v. *Doolittle*, 558 F.2d 292 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978); *Jackson* v. *Walker*, 585 F.2d 139 (5th Cir. 1978). The sixth circuit has recently adopted the fifth circuit's approach in *United States* v. *Andrews*, 612 F.2d 235 (6th Cir. 1980) and has specifically declined to follow the above-cited ninth circuit and District of Columbia authorities. *Id.* at 244.[6]

This conflict is ripe and worthy of this Court's attention; it should be resolved. The conversion counts and the tax indictment in this case present an opportunity for this Court to discuss what, if any, risks a defendant must bear

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[6] Indeed, Circuit Judge Keith's lengthy dissenting opinion in *Andrews* surveys the law of prosecutorial vindictiveness and concludes: "Given the chaotic nature of the law in the circuits regarding prosecutorial vindictiveness, we can expect further guidance on this question from the Supreme Court in the near future." *Id.* at 257.

if he is successful in asserting the right to be informed of the nature of the charges against him.

2. There Is A Conflict In Principle Among The Circuit Courts Of Appeal Regarding A Criminal Defendant's Constitutional Right To Fairness In The Plea Negotiation Process.

When the government announced that a tax indictment was pending, notwithstanding the plea agreement, Thomas and defense counsel elected not to enter a formal plea. In *Santobello* v. *New York*, 404 U.S. 257 (1971), the government's breach came after a guilty plea. The government had failed to adopt a posture at sentencing which had been promised. The government's defense in *Santobello* was that the prosecutor who appeared at sentencing was not involved in the negotiation process and did not understand the scope of the agreement. The government's position in this case at the evidentiary hearing to determine the scope and extent of the plea agreement was that no final agreement had been reached because the local United States Attorney's office was not present when the agreement was made with the Justice Department and further, that the agreement was not finalized because no plea was entered. The district court agreed with the government and held that the plea was never finalized.[7] The court of appeals affirmed and made the additional finding that it was unreasonable of Thomas to conclude that the tax indictment was covered by the agreement. Authorities in other circuits are at odds with both aspects of the opinion below.

Another circuit has held that a plea agreement is final, binding and enforceable prior to the formal entry of a plea if the terms of the agreement are clear and the Rule 11 proceeding is all that remains. *Cooper* v. *United States*,

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[7] The question of when a plea agreement becomes final is a matter of law. Thus, the scope of review is similar to that which the federal courts continually engage in to determine whether an individual has waived a constitutional right. *See Brewer* v. *Williams*, 430 U.S. 387, 397 n.4, 401-404 (1977).

594 F.2d 12 (4th Cir. 1979). The third circuit has recently refused to follow *Cooper. Virgin Islands* v. *Scotland,* 614 F.2d 360 (3d Cir. 1980).

The eighth circuit has held that a pre-indictment guilty plea to a campaign contribution offense bars a tax prosecution even though the tax investigation was conducted by a different grand jury and notwithstanding the fact that a possible tax prosecution was not discussed when the guilty plea was entered. *United States v. Minnesota Min. & Mfg. Co.,* 551 F.2d 1106 (8th Cir. 1977).

This case grants an opportunity for this Court to provide some guidance as to the reasonable expectations potential defendants and their counsel may have during the plea negotiation process. Most federal criminal cases are disposed of by plea, many before indictment. The opinion below holds that a potential defendant cannot reasonably expect that the grand jury which has induced the negotiation process will not return an indictment even though an agreement has been reached. It also holds that a handshake agreement with high level members of the Department of Justice is not enforceable. The implications of the opinion effect every criminal case and are worthy of review.

3. The Payment Limitation Regulations, As They Existed In 1971 Through 1973, Were Not Intended By Congress Or The Secretary Of Agriculture To Be The Basis For Criminal Liability.

In *Adamo Wrecking Co.* v. *United States,* 434 U.S. 275 (1978), this Court determined, among other things, that Congress had not chosen to prescribe either civil or criminal sanctions for violations of every regulation issued by the Administrator of the Environmental Protection Agency, and that Congress imposed civil liability for a wider range of violations than those for which it had imposed criminal liability. Like *Adamo Wrecking,* this case presents a question of Congressional intent with respect to the scope of criminal sanctions in the context of a violation of

an administrative regulation. It is of importance to the administration of all regulatory violations.

Given the experimental character of the new price support regulations, and the differing interpretations likely to be placed upon them by county executive directors and county committees, one might well hesitate to attach criminal liability to their violation. But the Secretary went further. In 7 C.F.R. § 795.16, he provided (in relevant years) [8] that if an individual participated in any scheme or device to evade the payment limitations, for example by "submitting false information to the county committee . . . or creating fictitious entities for the purpose of concealing the interest of a person in a farming operation," the sanction was that payments otherwise due "may be withheld or required to be refunded." 7 C.F.R. § 795.19 provided for joint and several liability in such a case.[9]

Only much later was § 795.19 amended (and renumbered) to provide that "The provisions of this part requiring the refund of payments shall be applicable and in addition to any liability under *criminal and civil* fraud statutes." [Emphasis added]. The determination to limit liability to civil sanctions was reached in part under 7 U.S.C. § 1307(3).[10]

Here, the government's entire case rested on allegations that the petitioners' violated the payment limitation pro-

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[8] The Federal Register cite to these superseded regulations is 35 Fed. Reg. 19339.

[9] "Where two or more individuals or legal entities, who are treated as one person thereunder, receive payments which in the aggregate exceed the limitation, such individuals or legal entities shall be liable, jointly and severally, for any liability arising therefrom."

[10] Beyond *Adamo Wrecking*, the Secretary's assurances present issues in this case not very different from those addressed in *United States* v. *Laub*, 385 U.S. 475 (1967).

visions contained in Part 795. And in that part the Secretary had chosen to exercise his power to limit the liability of the farmer to a refund of program benefits.

Given the severity of the sanctions sought here, it is doubtful that Congress intended that the Secretary do anything else. As *Gutknecht* v. *United States,* 396 U.S. 295 (1970), reaffirms, courts should not lightly attribute to Congress the intention to bestow upon a regulator the power to set up a system which provides for punishment, even when that punishment is ultimately meted out by a court at the conclusion of the administrative process.

CONCLUSION

For all of the above reasons, it is respectfully prayed that the writ of certiorari be granted.

Respectfully submitted,

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Dated: June 20, 1980

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOHN H. THOMAS, AND JON-T FARMS, INC., a corporation, *Defendants-Appellants.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOHN H. THOMAS, also known as J. H. Thomas, *Defendant-Appellant.*

Nos. 78-5249, 78-5374.

April 19, 1979.

Appeals from the United States District Court for the Northern District of Texas.

Before GEE and VANCE, *Circuit Judges,* and HUNTER,* *District Judge.*

GEE, *Circuit Judge*:

Appellants John Thomas and Jon-T Farms, Inc. were jointly indicted on 44 counts charging violations of 15 U.S.C. § 714m(a) and 18 U.S.C. § 2 (making or causing to be made false statements to the Commodity Credit Corporation [CCC] for the purpose of obtaining payments under the 1972 and 1973 Upland Cotton Allotment programs) and 47 counts charging violations of 15 U.S.C. § 714m(c) and 18 U.S.C. § 2 (causing conversion of CCC

* District Judge of the Western District of Louisiana, sitting by designation.

property by arranging cotton support payments for persons not qualified to receive them). Appellant John Thomas alone was named in an additional conversion count. After a jury trial, appellants were convicted on all counts, with the exception of one false statement count that was dismissed by the trial judge. Thomas received three-year concurrent sentences on all counts and a $3,000 fine on each false statement count. Jon-T Farms, Inc. was fined $5,000 on each false statement count.

In a second indictment John Thomas individually was charged with four counts of making and causing to be made false tax returns in violation of 26 U.S.C. § 7206(1). After a trial to the court on one count of the indictment, he was found guilty.[1] He was fined $5,000 and received a three-year sentence to run concurrently with the sentences in the cotton case. These two cases have been consolidated for appeal. Appellants challenge the convictions on a host of grounds requiring varying amounts of factual background for proper analysis. We will supply the facts relevant to each issue as we proceed.[2]

With respect to the cotton fraud indictment, appellants first challenge the sufficiency of the evidence to support the jury verdicts on the false statement counts. The cotton fraud indictment is based on appellants' participation in the Upland Cotton Program,[3] which is administered through the Commodity Credit Corporation.[4] In 1970, Congress amended the Agricultural Adjustment Act to provide that

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[1] The remaining three counts of the tax indictment were subsequently dismissed upon motion by the government.

[2] Because of the concurrent sentence doctrine, the legal and factual issues will be discussed only to the extent that they concern the false statement and tax fraud convictions. *See* note 24, *infra.*

[3] The Upland Cotton Program is fully explained in *United States v. Clark*, 546 F.2d 1130, 1132 (5th Cir. 1977).

[4] *See* Agricultural Adjustment Act of 1970, Tit. VI, § 602(e)(10), 84 Stat. 1377 (1970) (current version 7 U.S.C. § 1444(e)(10) (1973)).

no "person" could receive more than $55,000 in any crop year as a price support payment for upland cotton.[5] Congress authorized the Secretary of Agriculture to promulgate regulations defining person and assuring a fair and reasonable application of the payment limitation.[6] The regulations in effect in 1972 and 1973 provided that each individual entitled to share in the proceeds of a joint venture farming operation would be considered a separate person for the purpose of applying the payment limitation as long as the individual was actively engaged in the farming operations of the joint venture, by capital contribution or otherwise. 7 C.F.R. § 795.6 (1973).[7] The regulations also provided that if the land was custom farmed,[8] the custom farmer would not be considered a separate person from the person for whom he was performing the custom farming if the custom farmer had either a direct or an indirect interest in the farm as landowner, landlord, or in any other similar capacity. 7 C.F.R. § 795.15 (1973).[9] The regulations further provided that any changes in farming operations by lease or otherwise would be disregarded for the purpose of applying the payment limitation unless the changes were bona fide, substantive, and legally binding. 7 C.F.R. § 695.13 (1973).[10]

Jon-T Farms, Inc. is a wholly owned subsidiary of Jon-T Chemicals, in which appellant Thomas is the majority stock-

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[5] Agricultural Adjustment Act of 1970, Tit. I, § 101(1), 84 Stat. 1358 (1970) (current version at 7 U.S.C. § 1307(1) (Supp. 1978)).

[6] Agricultural Adjustment Act, Tit. I, § 101(4), 84 Stat. 1359 (1970) (current version at 7 U.S.C. § 1307(4) (Supp. 1973)).

[7] 35 Fed.Reg. 19340 (1970), *amended,* 36 Fed.Reg. 25210 (1971)

[8] Custom farming is the performance of farming services for hire with remuneration on a unit-of-work basis.

[9] 35 Fed.Reg. 19341 (1970), *amended,* 36 Fed.Reg. 25210 (1971).

[10] 35 Fed.Reg. 19340 (1970), *amended,* 36 Fed.Reg. 25210 (1971).

holder. Under the new regulations, Jon-T Farms was no longer eligible for price support payments for its entire farming operation. Consequently, the corporation leased most of its land to two joint ventures, Gaines County Farms (GCF) and Gaines County Joint Venture (GACO). Thomas recruited business associates and employees to become members of the joint ventures.[11] Generally, each venturer signed a personal note at a bank selected by Thomas, a power of attorney, ASCS Form 516 (Intention to Participate and Payment Application), ASCS Form 36 (Assignment of Payment), a joint venture agreement, and a lease. C. R. Bruce was selected to custom farm the land for both joint ventures. Based on Jon-T Farms' submission of ASCS Forms 516 and 580,[12] each joint venturer received a cotton price support payment of approximately $53,000 from the government in 1972 and in 1973. The jury found appellants guilty on 43 false statement counts based on the submission of Form 516 in 1972 and 1973 and Form 580 in 1973. The false statement counts were prosecuted on the theory that appellants made false statements to the CCC by the submission of the forms applying for payments in the name of each joint venturer and certifying compliance with the Upland Cotton Program when appellants knew that the joint venturers were not entitled to receive the payments because they were not involved in a bona fide and substantive joint venture farming operation separate and apart from appellants as required by the regulations.

Appellants claim that the evidence established that the joint venturers were entitled to receive payments because the operation was in fact in compliance with the regulations. The government responds that the joint venture

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[11] Appellants were not themselves members of either joint venture.

[12] ASCS Form 580 was a Report of Acreage and Certification of Compliance.

operations were not in compliance in two respects. First, the government contends that the paper structures were shams rather than bona fide and substantive changes in appellants' farming operations. Second, the government claims that Bruce was an employee of Jon-T rather than an independent contractor; therefore, the joint venturers were not separate persons under the regulations because their custom farmer had an interest in the land farmed.

Viewed in the light most favorable to the government,[13] the evidence established that, although the paper structures created by appellants were in compliance with the regulations, the appellants did not act in accordance with the paper structures. On paper, there were two separate entities, GACO and GCF, but the entities were not treated as separate and distinct by the parties. At the direction of Thomas, the cotton crops from the two joint ventures were combined, and the profits or losses were apportioned among the total number of joint venturers in the operation. According to the paper structures, all management and operation decisions required the agreement of a majority of the joint venturers. But the record reflects that virtually all decisions were made solely by John Thomas. The profits and losses of each joint venture were supposed to be shared equally by its members, but neither profits nor losses were shared equally. In 1973, Thomas directed that $3,000 in profits be distributed only to those members of the joint ventures who were also employees of Jon-T; those members of the joint ventures who were not Jon-T employees received nothing.[14] Whenever a joint venturer withdrew from the operation, the loss was apportioned among the remaining joint venturers instead of requiring the withdrawing

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[13] *Glaser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

[14] This imbalance in profit sharing was later corrected, although not until after the government began its investigation of the operation.

venturer to pay his proportionate share of the losses to the date of withdrawal. From this evidence, together with other evidence too extensive to discuss, the jury was entitled to conclude that the joint ventures were in fact shams rather than bona fide and substantive joint ventures.

There was also sufficient evidence to support a jury conclusion that Jon-T was performing the custom farming for the joint ventures through its employee C. R. Bruce. Although Bruce was ostensibly an independent contractor working for the joint ventures and there is some evidence to support such a characterization,[15] the evidence as a whole indicated that he was actually a Jon-T employee. There is really no other reasonable explanation for Jon-T's extensive involvement with Bruce. Jon-T provided a large amount of the equipment used by Bruce and paid the fuel bills for the custom farming operation. Jon-T hired a person whose full-time responsibility was to oversee the custom farming operation. Bruce's bank statements were regularly sent to Jon-T for reconciliation, and Bruce and his bookkeeper, selected by Jon-T, were carried on Jon-T's payroll health insurance plan. Bruce was authorized to purchase Jon-T stock by a corporate resolution designating him as a key and valuable employee.[16] There is ample evidence to support the jury's conclusion that Jon-T was performing the custom farming for the joint ventures through its employee C. R. Bruce.

Under either theory, therefore, and despite the considerable amount of conflicting evidence in the case, we must agree with the government that the evidence was sufficient to support the jury's ultimate conclusion that the state-

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[15] Jon-T did not treat Bruce as an employee for income tax withholding purposes. Bruce owned some of his own equipment, and he carried approximately 50 persons on his payroll.

[16] Aside from the children of John Thomas and the children of another Jon-T stockholder, only officers, directors, and employees of Jon-T were permitted to purchase Jon-T stock.

ments were in fact false because the joint venturers were not entitled to receive government payments.[17]

Appellants next argue that the imposition of criminal liability in the cotton fraud case is not in accordance with the doctrine of strict construction of criminal statutes.[18] *See, e. g., United States v. Laub,* 385 U.S. 475, 480, 87 S.Ct.

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[17] Appellants also contend that the false statement counts based on Form 516 must be reversed for three additional reasons. First, they contend that criminal liability cannot attach because the statements on Form 516 are literally true. This argument is foreclosed by our holding in *United States v. Clark,* 546 F.2d 1130, 1134 (5th Cir. 1977).

Second, they contend that the statements made on Form 516 are not material because the submission of Form 516 alone cannot induce payment. This argument is also without merit. Although the submission of Form 516 alone cannot induce payments, Form 516 is an integral step in the payment process, and payments are not made unless both Forms 516 and 580 are filed in the ASCS office. Third, appellants argue that the false statement counts based on Form 516 are barred by principles of res judicata. They contend that the government is attempting to relitigate issues already conclusively determined between the parties because the false statement counts based on Form 516 set out in the second cotton fraud indictment are not materially different from those set out in the first indictment, which was dismissed for failure to identify the false statement allegedly made "on" Form 516. Appellants' argument might be meritorious were it true that the false statement charges in the two indictments were materially indistinguishable. But the false statement counts in the second indictment contained two clarifying changes sufficient to bar the application of res judicata. The second indictment alleged that the false statements were made "by the submission" of the form rather than "on" the form, as alleged in the first indictment, and the second indictment included reasons why the named persons were not entitled to payments. In combination, these two changes clarified the government's false statement theory, remedying any supposed defect the trial judge had found in the prior indictment.

[18] Criminal sanctions were in fact imposed under identical circumstances in *United States v. Clark,* 546 F.2d 1130 (5th Cir. 1977), but this precise issue apparently was not raised in that case.

574, 577, 17 L.Ed.2d 526 (1967). Appellants' argument on this issue is very narrow. They do not challenge the Secretary's authority to issue the regulations nor do they challenge the potential applicability of 15 U.S.C. § 714m as an enforcement mechanism for these regulations. Instead, they contend only that, strictly construed, the statutory and regulatory scheme then in existence did not unequivocally provide for criminal liability for violations of payment limitations. During the years in question, 7 C.F.R. § 795.16 (1973)[19] provided that cotton payments could be withheld or a refund required if the applicant participated in a scheme to evade the payment limitation.[20] Similarly, language on ASCS Form 516 and in an ASCS brochure warned that false certifications might result in the loss of program benefits.[21] From this language, appellants infer that criminal liability should not have attached upon violations of the regulations. Appellants' argument is without merit. The statutory and regulatory scheme clearly provided for the imposition of criminal liability. Congress imposed the payment limitation, authorized the Secretary of Agriculture to issue regulations assuring a reasonable application of the limitation and directed that the program be administered through the Commodity Credit Corporation, which had long been under the protection of criminal fraud statutes (15 U.S.C. § 714m).[22] In the face of this statutory framework, we cannot accept appellants' argument that under the doc-

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[19] 35 Fed.Reg. 19341 (1970).

[20] The regulations were subsequently amended to provide that this refund liability was supplemental to criminal and civil fraud liability. 7 C.F.R. § 795.20 [39 Fed.Reg. 15024 (1974)]. Although appellants characterize this amendment as a change, it is more than likely a clarification. The Secretary listed the changes in a foreword without any mention that there was a change in liability. 39 Fed.Reg. 7943 (1974). Surely such an important change would have merited mention.

[21] Appellants apparently overlooked the language on ASCS Form 580 that specifically warned of criminal liability.

[22] *See* notes 4, 5, 6, *supra*, and accompanying text.

trine of strict statutory construction the imposition of additional civil administrative sanctions by regulation must be read as the negation of statutory criminal liability for fraud.[23]

Appellants also argue that six of the conversion counts were improperly joined with the remaining counts under Federal Rules of Criminal Procedure 8 and, alternatively, that the district judge abused his discretion in failing to grant a severance for prejudicial joinder under Federal Rules of Criminal Procedure 14. We reject both contentions. Joinder was proper because both defendants participated in a series of acts or transactions constituting offenses "so closely related in time, place, and/or manner as to show a connection between them." 8 *Moore's Federal Practice* § 8.06[2] at 8–34 (2d ed. 1978). *See United States v. Laca*, 499 F.2d 922, 925 (5th Cir. 1974). Motions for severance are addressed to the sound discretion of the trial court, and his decision will not be overturned on appeal absent a showing of prejudice. *United States v. Laca, supra.*

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[23] Appellants' reliance on *United States v. Laub, supra,* is misplaced. In *Laub* the Supreme Court held that the violation of an area restriction imposed by the Secretary of State was not criminally punishable. Although there is language in *Laub* favorable to appellants' position, the distinctions between *Laub* and the instant case are crucial. In *Laub* the decision was based on the interaction of two factors: first, it was doubtful that the criminal statute authorized the imposition of area restrictions imposed by the Secretary under other statutes; and second, the Secretary had provided "authoritative assurance that punishment [would] not attach." 385 U.S. at 487, 87 S.Ct. at 581. In this case (1) the appellants do not challenge the statutory authority of the Secretary to issue the regulations or to enforce them under the criminal statutes applicable to the Commodity Credit Corp., and (2) the language of the Secretary of Agriculture pointed to by appellants cannot be characterized fairly as "authoritative assurance that punishment [would] not attach" to violations of the payment limitation regulations, especially in view of the explicit language in ASCS Form 580 warning of criminal lability. *See* note 21.

Appellants have not carried their burden of demonstrating prejudice.

We have carefully considered appellants' other challenges to their convictions based on the false statement counts, and we find them without merit. Exercising our discretion under the concurrent sentence doctrine, we decline to address appellants' challenges relating solely to the convictions based on the conversion counts. *See, e. g., United States v. Binetti,* 547 F.2d 265, 269 (5th Cir.), *rev'd on other grounds,* 552 F.2d 1141 (1971).[24]

Appellant Thomas claims a due process violation in connection with the criminal tax indictment. He contends that the Internal Revenue Service violated its own regulations governing criminal tax investigations by its failure to notify him of the investigation and its failure to afford him a conference concerning the alleged tax violations. He relies on 26 C.F.R. § 601.107(b)(2), which provides that "[a] taxpayer who may be the subject of a criminal recommendation will be afforded a district intelligence conference when he requests one . . . ."

The rule cited by appellant applies to criminal investigations conducted by the IRS. In this case, the grand jury both originated and conducted the criminal tax investigation; the Internal Revenue Service was involved only tangentially. Although the rule is published in the Federal Register and codified in the Code of Federal Regulations, it is not an officially promulgated regulation but only a statement or procedure. Mertens, *Law of Federal Income*

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[24] Here, as in *Binetti,* "prejudice is not apparent and the possibility of adverse collateral consequences appears to be remote." 547 F.2d at 269. It also appears that the unreviewed convictions will not increase Thomas' severity rating under the Parole Commission guidelines, 28 C.F.R. § 2.20 (1978). *See United States v. Rubin,* 591 F.2d 278 at 281 (5th Cir. 1979).

Taxation, Regulations, *Internal Revenue Service Operations* p. 3 (1977). We are not prepared to hold that such a rule was intended to curtail the plenary power of the grand jury to indict for any crime within its jurisdiction. *See Sullivan v. United States,* 348 U.S. 170, 173, 75 S.Ct. 182, 184, 99 L.Ed. 210 (1954); *United States v. Hayes,* 589 F.2d 811, 818 (5th Cir. 1979).

Even if the rule were applicable to investigations initiated and conducted by the grand jury, it is not at all clear that any violations occurred. The rule does not require that a taxpayer be notified of an investigation, nor does it require that a conference be afforded in the absence of a request. Thomas concededly did not request a conference. Furthermore, Thomas was not in any way prejudiced by the failure of the IRS to afford him a conference, and his due process rights were adequately protected by trial. *See United States v. Goldstein,* 342 F.Supp. 661 (E.D.N.Y. 1972).

Appellants also challenge the government's conduct with respect to an alleged plea agreement that is the subject of much dispute. Over a period of nine months, appellants negotiated with government attorneys concerning the disposition of the criminal cotton fraud case. A partial agreement was reached with Justice Department attorneys in December 1976 that Thomas would enter four nolo contendere misdemeanor pleas for conversion, and the corporation would enter one nolo contendere felony plea for making a false statement. Only one question was left open at that time—whether the agreement would include a preplea conference with the court. After further negotiations, the appellants allegedly decided to accept the plea agreement on the government's terms, i. e., without the preplea conference, but that decision apparently was not communicated to the government.

When events were at this stage, the government informed appellants that the grand jury was about to return a tax

indictment against Thomas.[25] This information came as a complete surprise to the appellants, who were unaware that the government had been pursuing a tax investigation of Thomas. Appellants maintained that the contemplated tax indictment was an anticipated breach of the alleged plea agreement and consequently refused to proceed with the agreement.

In this unusual posture, appellants are now seeking specific performance of the alleged plea bargain. Though the issue suggests a number of novel questions, it is easily resolved on traditional grounds. Appellants' argument is viable only if we agree that the filing of the tax indictment was a breach of the proposed plea bargain. Appellants assert that they believed that the plea bargain would dispose of all criminal matters then under investigation. But in determining the scope of a plea bargain, we cannot use a subjective standard. *See Johnson v. Beto,* 466 F.2d 478, 479 (5th Cir. 1972). The test, as applied to this particular issue, is whether "the evidence viewed objectively would lead one in the position of the defendants to reasonably conclude that the [nolo] pleas would be fully dispositive of all federal criminal matters." *United States v. Minnesota Mining & Manufacturing Co.,* 551 F.2d 1106 (8th Cir. 1977). Although we do not doubt that appellants would have liked for the plea agreement to dispose of all criminal matters then under investigation, we cannot conclude that such an expectation was reasonable viewing the evidence objectively. The tax fraud charges are totally unrelated to the cotton fraud charges, appellants were not even aware of the ongoing tax investigation, and no government attorney ever mentioned possible tax charges in the negotiation process. While the question might be closer were the tax charges related to the cotton charges, it is inconceivable that Thomas could reasonably conclude that a plea bargain

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[25] The tax indictment was based on Thomas' deduction of gambling losses as business expenses.

relating to cotton fraud charges would dispose of totally unrelated tax charges. Since we find that the tax matters were not within the scope of the proposed plea agreement, appellants' contention that the government breached the agreement by filing the tax indictment must fail.

Appellants next contend that the indictments must be dismissed because the government violated Federal Rule of Criminal Procedure 6(e), whch governs the secrecy of grand jury proceedings. In this case grand jury material was disclosed to special agents of the Internal Revenue Service and the Department of Agriculture, who were working under the control and direction of the United States attorney in the investigation of this case. Appellants argue that the version of Rule 6(e) then in effect[26] prohibited the disclosure of grand jury material to persons other than government attorneys. This argument is foreclosed by our opinion in *United States v. Evans,* 526 F.2d 701, 707 (5th Cir.), *cert. denied,* 429 U.S. 818, 97 S.Ct. 62, 50 L.Ed.2d 78 (1976), interpreting the former version of Rule 6(e). We there held that "[r]epresentatives of government agencies actively assisting United States Attorneys in a grand jury investigation and working under their direction may lawfully have access to grand jury material in the performance of their duties." *See also In re William H. Pflaumer & Sons, Inc.,* 53 F.R.D. 464 (E.D.Pa.1971). Moreover, appellants make no claim of prejudice, nor do they make a showing of abuse of the grand jury process by the government. Even assuming that Rule 6(e) was somehow violated, dismissal of the indictment would not be the appropriate remedy in these circumstances. *United States v. Malatesta,* 583 F.2d 748, 753–54 (5th Cir. 1978),

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[26] Rule 6(e) has since been amended to make it clear that government personnel may have access to grand jury material when they are assisting a government attorney in the performance of his duty to enforce federal criminal law. Fed.R.Crim.P. 6(e) (Supp. 1978).

modified en banc on other grounds, 590 F.2d 1379 (Mar. 12, 1979).

Appellants also contend that the conversion counts and the tax counts must be dismissed because of prosecutorial vindictiveness. Appellants were originally charged in a 72-count indictment based almost entirely on 15 U.S.C. § 714m(a) (false statements).[27] The district judge dismissed all but three of the counts on appellants' motion alleging that the indictment was not sufficiently specific. The remaining three counts were dismissed upon motion of the government. Appellants were subsequently reindicted on 92 counts in the cotton case, 48 of which were based on 15 U.S.C. § 714m(c) (conversion), and Thomas alone was indicted on four counts in the tax case. Appellants contend that the conversion and tax counts were added in retaliation for the exercise of their constitutional right to be sufficiently apprised of the charges against them. Appellants rely on *Blackledge v. Perry,* 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), in which the Supreme Court held that it was constitutionally impermissible, even absent a showing of actual vindictiveness, for a prosecutor to substitute a more severe charge after a defendant exercised his statutory right to a trial de novo.[28] The Supreme

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[27] The indictment named both appellants in 71 false statement counts and Thomas alone in one embezzlement count based on 15 U.S.C. § 714m(b).

[28] Although a *Blackledge* challenge has not yet occurred in a situation in which the defendant complained of retaliation for the exercise of his constitutional right to be sufficiently apprised of the charges against him, we cannot imagine that such a right should not be accorded the same stature as a defendant's statutory right to a trial de novo. Other rights that have been protected from prosecutorial vindictiveness include the right to petition for a writ of habeas corpus, *Colon v. Hendry,* 408 F.2d 864 (5th Cir. 1969), the right of direct appeal, *United States v. Jackson,* 585 F.2d 139 (5th Cir. 1978), the right to enter a special plea of insanity, coupled with the right to remove to federal court, *Hardwick v. Doolittle,* 558 F.2d 292 (5th Cir. 1977), cert. denied, 434

Court's holding in *Blackledge v. Perry* was interpreted most recently by this circuit in *Jackson v. Walker,* 585 F.2d 139 (5th Cir. 1978). After extensive analysis, which we need not reiterate here, the *Jackson* panel concluded that "[i]n deciding whether to require a showing of actual vindictiveness or merely a showing of reasonable apprehension of vindictiveness, a court must weigh the extent to which allowing the second indictment will chill the exercise of the defendants' [due process] rights against the extent to which forbidding the second indictment will infringe on the exercise of the prosecutor's independent discretion." *Id.* at 145.

Turning to the facts in this case, we first note that because of the concurrent sentence doctrine, we decline to consider appellants' argument with respect to the conversion counts. *United States v. Binetti, supra.* With respect to the tax count,[29] we need not undertake a detailed analysis using the *Jackson* balancing test because of our decision in *Hardwick v. Doolittle,* 558 F.2d 292 (5th Cir. 1977), *cert. denied,* 434 U.S. 1049, 98 S.Ct. 897, 58 L.Ed.2d 801 (1978). We there held that when a prosecutor adds a new charge for relatively distinct criminal conduct that occurred in the same "spree of activity," defendant's due process rights are offended only if there is actual vindictiveness as opposed to the mere apprehension of vindictiveness. The countervailing prosecutorial interest here is even more pronounced than in *Hardwick* because the new charge is not based on the same "spree of activity." Therefore, following *Hardwick,* we hold that although appellant Thomas has estab-

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U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978), and, at least in some situations, the right to plead not guilty, *United States v. Jones,* 587 F.2d 802 (5th Cir. 1979) (by implication); *cf. Bordenkircher v. Hayes,* 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

[29] Appellant Thomas was convicted on only one tax count. The remaining three counts were dismissed upon motion by the government.

lished a prima facie case of prosecutorial vindictiveness with respect to the tax count, we must remand to the district court to afford the prosecutor an opportunity to present countervailing evidence.[30]

For reasons stated above, the judgment in No. 78–5249 is affirmed, and No. 78–5374 is remanded to the district court for proceedings consistent with this opinion.

AFFIRMED IN PART, REMANDED IN PART.

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[30] In its brief, the government attempts to rely on the "newly discovered evidence" explanation suggested by *Hardwick*. Although it may be true that the evidence establishing the tax violation was not secured until March 1977, the government offers no explanation for its decision to initiate a tax investigation for the years 1972 and 1973 after Thomas successfully challenged the sufficiency of the first cotton indictment in 1975.

APPENDIX B

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOHN H. THOMAS, AND JON-T FARMS, INC., a corporation, *Defendants-Appellants.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOHN H. THOMAS, a/k/a J. H. Thomas, *Defendant-Appellant.*

Nos. 78-5249, 78-5374.

Nov. 14, 1979.

Appeals from the United States District Court for the Northern District of Texas, Halbert O. Woodward, Chief Judge.

Travis D. Shelton, Lubbock, Tex., Michael E. Tigar, John J. Privitera, Washington, D.C., for defendants-appellants.

Bob D. Slough, Asst. U.S. Atty., Lubbock, Tex., for the U.S.

ON PETITION FOR REHEARING

(Opinion April 19, 1979, 5 Cir. 1979, 593 F.2d 615).

Before GEE and VANCE, *Circuit Judges,* and HUNTER,* *District Judge.*

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* District Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:

On rehearing, among other contentions, appellants press upon us the existence of possible collateral consequences deriving from the conversion counts, urging that these render inappropriate our disposition of those counts under the concurrent sentence doctrine. Assuming without deciding the presence of such consequences, we have reviewed appellants challenges to the convictions on the conversion counts and find them without merit except as to Count 92, the Blackstock count. As to that count, we conclude that the evidence does not support the conviction. To this extent, we therefore grant rehearing and reverse the conviction on Count 92.

The same considerations require that the cause be remanded as to the conversion counts for consideration by the court below of whether the addition of these counts, or any of them, was motivated by actual prosecutorial vindictiveness. To this extent as well rehearing is granted. In all other respects, it is denied.

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART IN NO. 78-5249.

APPENDIX C

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOHN H. THOMAS, AND JON-T FARMS, INC., a corporation, *Defendants-Appellants.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOHN H. THOMAS, also known as J. H. Thomas, *Defendant-Appellant.*

Nos. 78-5249, 78-5374.

May 23, 1980.

Appeals from the United States District Court for the Northern District of Texas.

Before GEE and VANCE, *Circuit Judges,* and HUNTER,* *District Judge.*

GEE, *Circuit Judge.*

Former opinions in this call detail at length its facts and earlier proceedings. *United States v. Thomas,* 593 F.2d 615 (5th Cir. 1979), *modified on rehearing,* 604 F.2d 450 (5th Cir. 1979). On those appeals, we concluded that a remand was required for the district court to determine whether additional charges levelled in new indictments resulted from actual prosecutorial vindictiveness. That has now

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* Senior Judge of the Western District of Louisiana, sitting by designation.

been done. The district court concluded that such vindictiveness was not present, and we affirm.

That portion of the procedural history material here is well described in the memorandum opinion of the district court on remand:

The circumstances surrounding these cases stretch back over several years to 1975. Originally John H. Thomas, Jon-T Farms, Inc. and A. Earl Jones were indicted in a seventy-two count indictment charging violation of 15 U.S.C. § 714m(a) and (b). Seventy-one counts of the indictment charged the defendants with the making of false statements under § 714m(a). The remaining count involved the fraudulent inducement of the issuance of a Commodity Credit Corporation sight draft. On November 26, 1975, this court dismissed sixty-seven of the counts on the ground that the dismissed counts did not allege and identify the statements which were alleged to be false. . . . Subsequently, two additional counts were dismissed by this court and the remaining counts were dismissed on the motion of the government. Additionally, the motion to sever by defendant A. Earl Jones was granted.

The dismissals were without prejudice to the right of the government to again present evidence to the grand jury concerning these charges. In 1977 evidence was presented to a different grand jury and on May 5, 1977, an indictment was returned in CR-5-77-14, the Cotton Case, charging John H. Thomas and Jon-T Farms, Inc. in ninety-two counts. Forty-four of the counts in the new indictment alleged the making of false statements under § 714m(a) and forty-eight of the counts alleged conversion of Commodity Credit Corporation funds under § 714m(c). This 1977 indictment was different from the prior 1975 indictment in that the prior indictment did not contain any conversion counts and the new indictment dropped several of the false statement counts found in the 1975 indictment. The defendants contend that this re-indictment, with the additional

penalties that could be imposed over those which could have been imposed under the first indictment was the result of prosecutorial vindictiveness. John H. Thomas, individually, also alleges that his indictment in the CR-5-55-13, the Tax Case by the same 1977 grand jury at approximately the same time was also the result of prosecutorial vindictiveness.

Our reasons for affirming the district court are simply stated. In our opinions cited above we determined that the presence or absence of actual prosecutorial vindictiveness, as opposed to the appearance or apprehension of it, was the governing test to be applied in passing on the permissibility of the government's additional charges. That is the law of this case.[1]

The district court, on evidence which we have carefully examined and find amply sufficient, concluded that the government had carried its burden to demonstrate an absence of actual vindictiveness here. The conversion counts were added out of a proper concern by the prosecutor to have a second bowstring should the false statement counts be again dismissed. The tax charges grew naturally out of developments in the continuing grand jury proceedings in the cotton cases, developments which included the later recantation by a witness of earlier perjurious and mislead-

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[1] Even if it were not, the authority of our decision in *Jackson v. Walker*, 585 F.2d 139 (1978), on which we relied in positing a balancing test to determine whether a showing of actual or merely apprehended vindictiveness would be required, may be substantially undermined by the Supreme Court decision in *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), an authority which our cases on this subject do not appear to have taken into account. The dissent in *Bordenkircher* views that decision as signalling a general retreat from *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), see 434 U.S. at 365–6, 98 S.Ct. at 669–670; and this may be so. See the thoughtful and searching analysis of the Sixth Circuit in *United States v. Andrews*, 612 F.2d 235 (1980).

ing testimony which had appeared to absolve the defendant. By the time of the later indictment, the facts had unfolded to such a degree that a prosecutorial failure to go forward with the tax case would have been a dereliction of duty. There it ends.[2]

AFFIRMED.

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[2] We have retained jurisdiction of the entire case for the convenience of the parties, to avoid the necessity of their going forward piecemeal. Our work is now done, subject only to any rehearing which may be sought of the matters here decided. Subject only to further order of this court issued in that connection, mandate in the entire case shall issue in accordance with customary procedures.